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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

RICARDO GARCIA,

Defendant and Appellant.

C060201

(Super. Ct. No. CRF08-1245)

A jury convicted defendant Ricardo Garcia of petty theft and, in bifurcated proceedings, defendant admitted a prior "theft" for purposes of the charged offense of petty theft with a prior. Defendant also admitted serving a prior prison term for a second degree burglary conviction in 2003. The court sentenced defendant to state prison for an aggregate term of four years.

On appeal, defendant contends counsel rendered ineffective assistance at sentencing. We disagree and will affirm the judgment.

FACTS

On May 2, 2008, defendant visited R.W. at her apartment. They had a relationship which began in November 2007. After defendant arrived, R.W. received a check in the mail. They went to a store to cash the check and to get a money order for her rent. Once she got the money order, R.W. had about \$370 in cash. She gave money to defendant for a taxi and she used some for groceries. She put the remaining three \$100 bills in her purse.

When defendant returned to R.W.'s apartment, he suggested they take a shower. When R.W. got out of the shower, she discovered defendant had gone and the \$300 was missing. R.W. called the police and a motel where defendant often stayed. She learned defendant had just checked into the motel and called the police back with this information.

Yuba City Police Officer Brent Novak went to the motel and spoke to defendant. The officer noticed \$25 in cash on a table. Defendant had paid \$275 for the room. The motel clerk turned over the three \$100 bills and asked for the \$25 in change he had given to defendant.

DISCUSSION

Defendant contends counsel rendered ineffective assistance in failing to object to the court's dual use of the prior prison term to enhance the prison sentence and to impose the upper term. Defendant claims that if counsel had made certain objections and arguments, it is reasonably probable that the

court would not have imposed the upper term for petty theft with a prior theft. We are not persuaded.

Probation Report

The probation report outlined defendant's criminal history. In 2001, defendant violated Penal Code section 12020, subdivision (a), a misdemeanor, for which defendant received a fine. No details of this offense appear in the probation report.

In 2003, defendant was convicted of passing forged checks, a felony. He reportedly "stole and forged checks belonging to his sister" and "cashed the checks at various businesses." In another case in 2003, defendant was convicted of second degree burglary, a felony. He reportedly "used forged checks stolen from three victims to purchase items at various local stores." He was originally granted probation in both cases but violated the same when he failed to submit to a drug test. After criminal proceedings were suspended twice in both cases, defendant was deemed mentally competent and sentenced to state prison in both cases for the midterm of two years with presentence custody credit of 735 days. The probation report noted: "Def[endant] is CTS, and by stipulation, def[endant] will not be on parole once he has been processed by the parole office." However, the next notation in the probation report reflects that on January 17, 2007, he violated parole and, after a parole hearing on May 21, 2008, he returned to prison to finish the term.

The probation officer also reported on defendant's substance abuse. Defendant had previously admitted that he smoked marijuana on a daily basis during his late teens. Defendant reported that he used methamphetamine a few times when he was 20 years of age; he had previously denied ever using the same. He had previously claimed that he abused prescription medication such as Oxycontin on a daily basis. He claimed he currently had no problem with the same.

The probation officer stated that defendant was not statutorily eligible for probation pursuant to Penal Code section 1203, subdivision (e)(4) [two prior felony convictions], and that defendant's case was not an unusual one based on his criminal history. As factors against probation, the probation officer listed the following: the victim was vulnerable; defendant inflicted emotional injury; the manner in which the crime was carried out demonstrated sophistication or professionalism; defendant took advantage of a position of trust; defendant's prior record indicated a pattern of regular or increasingly serious criminal conduct; defendant's prior performance on probation or parole was unsatisfactory; defendant's ability to comply with probation was limited because of his substance abuse and mental health history; and defendant did not appear remorseful. The probation officer listed no factors in favor of a grant of probation.

The probation officer recommended an aggregate term of four years in state prison, that is, the upper term for petty theft with a prior theft and a consecutive one-year term for the prior

prison term. As factors in aggravation, the probation officer added that defendant's prior convictions were numerous or increasingly serious; defendant had served a prior prison term; and defendant was on parole when he committed the current offense. The probation officer listed no factors in mitigation.

Sentencing

Defense counsel commented that the probation officer's recommendation was "high." Defense counsel stated that given defendant's record, "the upper term appears *on its face* probably to be appropriate" except that defendant's two prior felony convictions occurred during a three- or four-month period of time when he was experiencing "some mental health issues."

(Italics added.) Defense counsel acknowledged that defendant's two prior felonies made him statutorily ineligible for probation but argued the "totality of the circumstances" warranted a grant of probation. Defense counsel suggested the present case involved a disagreement with respect to the relationship. Defense counsel sought the low term in the event that the court was not inclined to grant probation.

The prosecutor agreed with the recommendation of the probation officer, stating that defendant had been on probation several times and failed the same, and was on parole at the time of the current offense. The prosecutor argued that defendant was a serious threat to the community in that he "continually victimizes people" and that he took advantage of a vulnerable person, his girlfriend.

Defense counsel responded that defendant had not violated probation several times. With respect to the prison commitment and parole resulting from the crimes of which defendant was convicted in 2003, defense counsel suggested that defendant was listed as on parole only because of "some problem in the system" even though his custody credits were "astronomical." Defense counsel stated: "Because he had so much time it was expected he would not get parole. In fact, he did end up on parole because parole indicated that they could not do anything other than place him on parole, and it was later violated because of the new case, but he shouldn't have been on parole in the first place given the agreement that was done pursuant to his plea."

The probation report reflects that when defendant was originally granted probation in 2003, he sustained one violation. No other probation violations appear in the report. The probation report reflects that defendant was on parole at the time of the current offense.

The court denied probation. The court determined that even if defendant had not been statutorily ineligible, probation would be denied because defendant took advantage of a position of trust, his prior record indicated a pattern of regular criminal conduct, his prior performance on probation and parole were unsatisfactory, and defendant was not remorseful. The court imposed the upper term of three years based on the prior theft conviction (passing forged checks in 2003) and the fact he was on parole at the time of the current offense. The court

imposed a consecutive one-year term for the prior prison term served for the second degree burglary conviction in 2003.

Analysis

“ “[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel’s performance was ‘deficient’ because his ‘representation fell below an objective standard of reasonableness . . . under prevailing professional norms.’ [Citation.] Second, he must also show prejudice flowing from counsel’s performance or lack thereof. [Citation.] Prejudice is shown when there is a ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citations.]” [Citation.]” (*People v. Avena* (1996) 13 Cal.4th 394, 418.)

As to counsel’s performance, “[c]ounsel’s duty at sentencing is to be familiar with the sentencing alternatives available to the court, to make sure that the court is aware of such alternatives, to explain to his or her client the consequences of the various dispositions available and to be certain that the sentence imposed is based on complete and accurate information. [Citations.]” (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085-1086; *People v. Scott* (1994) 9 Cal.4th 331, 351 (*Scott*).)

Defendant claims defense counsel failed to object to the court’s dual use of his 2003 second degree burglary conviction. He argues the record is at best unclear as to whether the court

used the prior prison term for second degree burglary to impose both the upper term for the underlying offense of petty theft with a prior theft and the prior prison term enhancement. We disagree.

Defense counsel's performance was not deficient for failing to object as claimed because the record clearly shows that the court did not rely on the prior prison term for the burglary offense as an aggravating factor to impose the upper term.¹ Instead, the court cited defendant's prior felony conviction for passing forged checks and the fact he was on parole to impose the upper term.

Defendant claims that defense counsel conceded that the upper term was appropriate given defendant's prior convictions. We reject this claim. Defense counsel stated that defendant's record "on its face" suggested an upper term was appropriate but

¹ After denying probation, the court stated that "an appropriate term in this matter, the court has two factors in its mind that not only justify but cry out for a prison term, an upper term I should say, in this matter. That being that he has a prior felony conviction for [Penal Code section] 475(c) [passing forged checks] in 2003, and secondly that he was on parole when the crime was committed." After defense counsel argued against the upper term, the court reiterated its reasons: "For the reasons heretofore stated -- that being the prior felony conviction for a [Penal Code section] 475(c) in '03 and also the fact that he was on parole when he committed the current crime -- the court will impose the upper term, said upper term being a period of three years." The court then turned to the prior prison term: "Also, we have a situation where the defendant has a prior prison term for a burglary conviction out of '03, which will result in an additional one year being added to that term."

made her arguments why it was not based on the totality of the circumstances. Defendant claims defense counsel should not have conceded and then argued against the upper term. Defendant is nitpicking when he challenges the order in which counsel made her arguments.

Defendant states that counsel should have "forcefully" argued that the passing forged checks conviction "occurred at the same time as the burglary," that "both offenses were committed during a brief period of aberrant behavior," and that the offenses were evidence of his prior mental health problems. The record reveals that defense counsel argued all these things and that she complied with her duty at sentencing. Defense counsel acknowledged that defendant's two prior felony convictions made him statutorily ineligible for probation but argued for probation, suggesting that the present case involved a disagreement with respect to the relationship. In the event the court was not inclined to grant probation, defense counsel sought the low term for the underlying offense. Defense counsel argued that the probation officer's recommendation of an upper term sentence was "high," claiming that defendant committed his prior felonies during a short period of time when he was mentally incompetent. Defense counsel also corrected the prosecutor, stating that defendant had not violated probation several times. Defense counsel claimed that defendant was listed in the probation report as on parole for the 2003 offenses only because of a problem in the system since he had enough credit. She was familiar with the sentencing

alternatives and argued the same to the court. “‘It is not sufficient to allege merely that the attorney’s tactics were poor, or that the case might have been handled more effectively. [Citations.] [para.] Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics.’ [Citations.]”
(*People v. Kelley* (1990) 220 Cal.App.3d 1358, 1373.)

Defendant claims that defense counsel should have “resolved, by writ or other process” the inconsistency in the probation report with respect to whether defendant was on parole or had enough credit to cover the parole period as well. “If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citations.]”
(*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Defense counsel’s argument reflects that she investigated whether defendant was in fact on parole at the time of the current offense and he was. Defense counsel claimed that defendant should not have been, suggesting there was a misunderstanding in the 2003 plea agreement. There is a satisfactory explanation why defense counsel did not resolve the matter “by writ or other process.” She could not do anything about a case that had occurred many years prior. Further, defendant violated parole and, after a parole hearing, he returned to prison to

finish the term. The matter was probably raised, discussed and resolved against defendant at the parole hearing. On this record, we reject defendant's claim that defense counsel's performance was deficient.

As to the prejudice prong of an ineffective assistance of counsel claim, defendant has the burden of establishing that he would have received a lesser sentence as a matter of demonstrable reality, not speculation. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241; *People v. Williams* (1988) 44 Cal.3d 883, 937; *People v. Reeves* (1966) 64 Cal.2d 766, 774.) Even assuming defense counsel's performance was deficient, defendant has failed to demonstrate that he would have received a more favorable sentence.² On the record before us, there is no indication that, even if counsel had further argued or objected as defendant claims, the court would have imposed the midterm or the low term. An objection to an improper factor would have been futile (*People v. Price* (1991) 1 Cal.4th 324, 387) because the court stated another valid reason to impose the upper term, that is, the fact that defendant was on parole when he committed the current offense. Since there were no mitigating factors and a single aggravating factor is sufficient to impose the upper term (*People v. Osband*

² "When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper." [Citation.] (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)

(1996) 13 Cal.4th 622, 728), there is no reasonable probability that defendant would have received a more favorable sentence even assuming the court violated the rule against dual use of facts (*People v. Coleman* (1989) 48 Cal.3d 112, 166 [improper dual use of the same fact for imposition of both an upper term and an enhancement "does not necessitate resentencing if '[it] is not reasonably probable that a more favorable sentence would have been imposed in the absence of the error'"]). Further, the trial court cited several factors in denying probation had defendant been eligible. One or more of those factors could have been cited as well to impose the upper term. (*Scott*, *supra*, 9 Cal.4th at p. 350, fn. 12 [same reason may be used to deny probation and to impose the upper term]; *People v. Bowen* (1992) 11 Cal.App.4th 102, 106.) We find no prejudice. Thus, defendant's ineffective assistance of counsel claim fails.

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

CANTIL-SAKAUYE, J.